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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3412-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ABRAHAM MCFARLAND,

Defendant-Appellant.

Submitted October 23, 2017 – Decided April 16, 2018

Before Judges Accurso and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Cumberland County, Indictment
No. 13-07-0572.

Joseph E. Krakora, Public Defender, attorney
for appellant (Stephen W. Kirsch, Assistant
Deputy Public Defender, of counsel and on the
brief).

Jennifer Webb-McRae, Cumberland County
Prosecutor, attorney for respondent (Stephen
C. Sayer, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Abraham McFarland appeals from his conviction for
second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-

5(b). He claims the court's jury instructions on the elements of the offense were erroneous and require reversal of his conviction. We disagree and affirm.

I.

Defendant was charged in an indictment with unlawful possession of a .380 caliber handgun without first obtaining a permit to carry a firearm. The trial evidence showed that during the execution of an arrest warrant at co-defendant John W. Lee's apartment, police recovered a .25 caliber handgun and a .380 caliber handgun from a bedroom hamper.

Defendant was arrested at the apartment with John W. Lee and Tymonn S. Lee. During defendant's recorded police interrogation that was played for the jury, he admitted ownership of the .380 caliber handgun. There was also testimony that in a separate interrogation, John W. Lee admitted ownership of the .25 caliber handgun.¹ Without objection, the State introduced into evidence

¹ John W. Lee and Tymonn S. Lee were charged in the indictment with two drug-related offenses. John W. Lee was also charged with second-degree unlawful possession of the .25 caliber handgun while committing the crime of possessing a controlled dangerous substance, N.J.S.A. 2C:39-5(b)(1), and second-degree possession of the handgun by a certain person prohibited from possessing a handgun, N.J.S.A. 2C:39-7(b)(1). The record shows the charges against John W. Lee were resolved prior to defendant's trial. The record does not disclose the disposition of the charges against Tymonn S. Lee. In any event, defendant was tried as a single defendant on the sole charge in the indictment against him.

a State Police Firearms Unit representative's certification stating the pertinent records showed defendant "never had a permit to carry a handgun in the State of New Jersey." An officer also testified the investigation revealed the recovered guns were not purchased using a permit.

During the charge conference, the court said it would instruct the jury concerning the elements of unlawful possession of a handgun under N.J.S.A. 2C:39-5(b), and provided counsel with a copy of proposed final jury instructions that included the model jury charge for the offense. See Model Jury Charges (Criminal), "Unlawful Possession Of A Handgun (N.J.S.A. 2C:34-5(b))" (rev. Feb. 26, 2001). Defense counsel's only objection to the proposed charge on the offense was to the inclusion of an instruction on joint possession. The court overruled the objection.

Consistent with the discussions during the charge conference, in its final jury instruction the court stated defendant was charged with unlawful possession of a weapon. The court explained the statute upon which the charge was based provides that

[a]ny person who knowingly has in his possession any handgun, without first having obtained a permit to carry the same, is guilty of a crime.

[(Emphasis added).]

Utilizing the model jury instruction, the court then separately defined the elements of the crime, explaining the State was required to prove three essential elements: (1) the gun introduced into evidence was a handgun: (2) defendant knowingly possessed the handgun, and (3) "[d]efendant did not have a permit to possess such a weapon." (Emphasis added). See Model Jury Charges (Criminal), "Unlawful Possession Of A Handgun (N.J.S.A. 2C:34-5(b))" (rev. Feb. 26, 2001).

After providing further instructions concerning the first two elements of the offense, the court addressed the third element, stating:

The third element that the State must prove beyond a reasonable doubt is that the [d]efendant did not have a permit to possess such a weapon – a handgun.

If you find that the [d]efendant knowingly possessed the handgun and that there is no evidence that the [d]efendant had a valid permit to carry such a handgun, then you may infer, if you think it appropriate to do so, based upon the facts presented, that [d]efendant had no such permit.

Note, however, that as with all other elements, the State bears the burden of showing beyond a reasonable doubt the lack of a valid permit and that you may draw the inference only if you feel it appropriate to do so under all of the facts and circumstances.

Later in the charge, the judge explained the verdict sheet to the jurors. The judge said:

The only question you need to answer is question number one, Possession of a Weapon. How do you find the Defendant on the charge that on or about the 19th day of February 2013, . . . knowingly did possess a certain weapon; that is a . . . 380 caliber handgun . . . without first having obtained a permit to carry a firearm in accordance with the provisions of N.J.S.A. 2C:58-4.

[(Emphasis added).]

The jury was given a verdict sheet restating the question in accordance with the judge's instructions.

After being advised the jury reached a verdict, the judge polled each juror, asking, "How do you find the [d]efendant on the charge that on or about the 19th day of February 2013, . . . [he] knowingly did possess a . . . 380 caliber handgun . . . without having first obtained a permit to carry a firearm, in accordance with the provisions of N.J.S.A. 2C:58-4?" Each juror stated they found defendant guilty of the charge.

The court sentenced defendant to a five-year custodial term with a three-year period of parole ineligibility. This appeal followed.

On appeal, defendant presents the following argument:

POINT I

THE JURY INSTRUCTION ON UNLAWFUL POSSESSION OF A WEAPON WITHOUT A CARRY PERMIT IMPROPERLY TOLD THE JURY THAT THE "PERMIT" ELEMENT REQUIRED THE STATE TO PROVE THAT THE DEFENDANT DID NOT HAVE A "PERMIT TO POSSESS" THE WEAPON; PARTICULARLY WHEN THERE WAS EVIDENCE IN THE CASE ABOUT BOTH PURCHASER PERMITS AND CARRY PERMITS, REFERRING TO A NONEXISTENT "PERMIT TO POSSESS" THE GUN FAILED TO PROPERLY INFORM THE JURY OF THAT ELEMENT OF THE CRIME. (NOT RAISED BELOW).

II.

In pertinent part, N.J.S.A. 2C:39-5(b)(1) provides that "[a]ny person who knowingly has in his possession any handgun . . . without first having obtained a permit to carry same as provided in N.J.S.A. 2C:58-4, is guilty of a crime of the second degree." (Emphasis added). The "absence of a permit" to carry "is an essential element of the offense" of unlawful possession of a handgun, N.J.S.A. 2C:39-5(b), "and thus, one to be determined by the jury." State v. Ingram, 98 N.J. 489, 494-95 (1985). Our Supreme Court has held a trial court's refusal to instruct the jury on the State's burden of proving the absence of a license to carry requires reversal of a conviction under N.J.S.A. 2C:39-5(b). State v. Vick, 117 N.J. 288, 289, 292-93 (1989). The State bears the burden of proving a defendant knowingly possessed a handgun without a permit to carry a handgun. See *ibid.*

For the first time on appeal, defendant claims the court erred in defining the third element of unlawful possession of a handgun under N.J.S.A. 2C:39-5(b). More particularly, defendant argues N.J.S.A. 2C:39-5(b) prohibits possession of a handgun "without first having obtained a permit to carry . . . [the handgun] as provided in N.J.S.A. 2C:58-4," (emphasis added), but the court instructed that the State was required to prove defendant possessed the handgun while he "did not have a permit to possess such a weapon." (Emphasis added).

Defendant asserts the purported error was clearly capable of producing an unjust result because there was evidence defendant lacked both a permit to purchase and a permit to carry the handgun. Defendant contends the instruction's reference to the "permit to possess" may have confused the jury and resulted in a guilty verdict founded on the absence of a purchaser's permit, and not on the absence of the carry permit specified in N.J.S.A. 2C:39-5(b). We are not persuaded.

"[A]ppropriate and proper charges [to a jury] are essential for a fair trial." State v. Baum, 224 N.J. 147, 158-59 (2016) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). "Because proper jury instructions are essential to a fair trial, 'erroneous instructions on material points are presumed to' possess the

capacity to unfairly prejudice the defendant." Id. at 159 (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)).

However, where there is no objection to the jury charges, "it may be presumed that the instructions were adequate." State v. Belliard, 415 N.J. Super. 51, 66 (App. Div. 2010) (quoting State v. Morais, 359 N.J. Super. 123, 134-35 (App. Div. 2003)). "A claim of deficiency in a jury charge to which no objection is interposed 'will not be considered unless it qualifies as plain error.'" State v. R.B., 183 N.J. 308, 321 (2005) (quoting State v. Hock, 54 N.J. 526, 538 (1969)).

A defendant who fails to object to a jury charge at trial bears a "considerable" burden and must establish "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." Ibid. (quoting Hock, 54 N.J. at 538); accord State v. Burns, 192 N.J. 312, 341 (2007). Defendant fails to sustain that burden here.

In our assessment of the court's jury charge, we do "not look at portions of the charge alleged to be erroneous in isolation." State v. McKinney, 223 N.J. 475, 494 (2015). We consider the charge "'as a whole to determine its overall effect,' and 'whether

the challenged language was misleading or ambiguous.'" Ibid. (internal citations omitted) (first quoting State v. Jordan, 147 N.J. 409, 422 (1997); and then quoting State v. Nelson, 173 N.J. 417, 447 (2002)). Applying these principles, we are satisfied that when the charge is considered in its entirety, the court's reference to the "permit to possess" was neither misleading nor ambiguous. See id. at 494.

The court first explained defendant was charged under a statute proscribing possession of a handgun without having obtained a "permit to carry." Although the subsequent instruction concerning the elements of the offense refers to a "permit to possess," the court provided a more specific instruction that if the jury determined defendant knowingly possessed the handgun and there was no evidence "[d]efendant had a valid permit to carry such a handgun," it could infer defendant "had no such permit." The court also instructed that the State had the burden of proving "the lack of a valid permit," and explained that the jury could, if it chose to do so, draw the inference there was a lack of a valid permit based on the evidence showing the lack of a "permit to carry." Thus, the instruction, when viewed in its entirety, used the terms "permit to possess" and "permit to carry" interchangeably to properly define the State's burden under N.J.S.A. 2C:39-5(b).

The court also expressly instructed the jury that the only issue it was required to decide was whether defendant was guilty of knowingly possessing the handgun "without having first obtained a permit to carry a firearm." The verdict sheet required the jury to determine defendant's guilt based on that issue, and each juror separately stated they found defendant guilty of that precise offense.

We are not persuaded by defendant's contention that because there was testimony the gun was purchased without a purchase permit, the reference to a "permit to possess" in the charge may have confused the jury. As noted, the totality of the court's instructions made clear the State was required to prove defendant did not have a permit to carry. Moreover, the testimony concerning the permit to purchase was fleeting, the jury was never advised defendant was charged under a statute proscribing possession of a weapon without a permit to purchase, and the jury charge makes no reference to a permit to purchase.

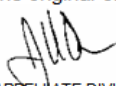
"[P]ortions of a charge alleged to be erroneous cannot be dealt with in isolation but the charge should be examined as a whole to determine its overall effect." State v. Marshall, 123 N.J. 1, 135 (1991) (quoting State v. Wilbely, 63 N.J. 420, 422 (1973)). When considered in their totality, there is nothing in the jury instructions that permits a reasoned conclusion the jury

may have convicted defendant based on a finding he did not have a permit to purchase the handgun, and we find no basis to conclude the instructions included any legal impropriety prejudicially affecting defendant's rights or possessing the clear capacity to bring about an unjust result. See R.B., 183 N.J. at 321.

We last observe the judge honored the requirement that "insofar as consistent with and modified to meet the facts adduced at trial, model jury charges should be followed and read in their entirety to the jury[,]" because "[t]he process by which model jury instructions are adopted in this State is comprehensive and thorough." Id. at 325. Although the court's use of the model jury charge "is not determinative, it is a persuasive argument in favor of the charge as delivered." State v. Angoy, 329 N.J. Super. 79, 84 (App. Div. 2000).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION